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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548**

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FILE: B-209705

DATE: July 5, 1983

MATTER OF: Power Energy Industries

DIGEST:

1. Determination of contracting agency to cancel advertised solicitation is not unreasonable where only responsive bid received was substantially higher than the Government estimate and potential supplier at significantly lower cost was unjustifiably excluded from bidding.
2. Protester alleging bad faith in agency decision to cancel solicitation has not met its burden of meeting judicially established standard of "well-nigh irrefragable proof" by making unsubstantiated allegations of contradictory Government action and Government collusion with protester's competitors.

Power Energy Industries (PEI) protests the Navy cancellation of invitation for bids (IFB) No. N00406-82-B-0079 and any award of a contract under request for proposals (RFP) No. N00406-83-R-0790, for a rectifier assembly, by the Naval Supply Center, Puget Sound Naval Shipyard (PSNS).

We deny the protest.

Prior to issuing the instant IFB, the Navy issued RFP No. N00406-82-R-0057 for, among other things, the rectifier assembly. PEI was the only offeror (\$59,810). PSNS's technical office determined PEI's offer to be **unreasonably high, based on its estimate of \$44,500, derived from a market analysis.**

The Navy then resolicited under the instant IFB. An amendment to the IFB extended the bid opening date from September 21, 1982, to September 28, 1982. However, the Navy mistakenly opened a bid submitted by **General Electric (GE) on September 21. The Navy decided not to cancel the solicitation, revealed GE's**

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bid, and opened bids as scheduled on September 28. GE's bid was determined to be nonresponsive. PEI's bid of \$59,810 was again rejected as excessively high based on the Government estimate of \$44,500. Also, Westinghouse, which had requested an extension of the original bid opening date, apparently had failed to bid due to misleading Navy advice and the nonreceipt of the amendment concerning the new bid opening date.

The Navy decided it was in the Government's best interests to cancel and resolicit based on the unacceptability of the bids and PSNS information that Westinghouse would supply the required assembly for approximately \$35,000. Under the instant RFP, proposals were submitted by Westinghouse (\$44,694), PEI (\$59,810), and Infase, Inc. (\$68,600). The Navy has not awarded a contract.

PEI questions the validity of the market analysis upon which the PSNS technical office determined that its price was excessive, pointing out that its price was consistent with the prices PEI is charging both Government and private users for similar equipment. PEI further contends that the exposure of its bid price created an auction atmosphere. PEI also asserts that the Navy conducted the procurements in bad faith, alleging that the Navy was inconsistent as to the basis for cancellation of the IFB and as to whether it had previously procured similar rectifier assemblies, discussed PEI's price with competitors, and colluded with Westinghouse to ensure that Westinghouse was awarded the contract. This latter assertion is allegedly evidenced by the Navy's knowledge of Westinghouse's original estimate of \$35,000, Westinghouse's subsequent offer of \$44,964 (within 1 percent of the Government estimate), and the fact that the interval between Westinghouse's estimate and offer was too short to justify a 28.5-percent increase in price.

The authority vested in the contracting officer to decide whether **or not to** cancel an invitation and resolicit is extremely broad. Milum Textile Services, B-207043, August 10, 1982, 82-2 CPO 124. Defense Acquisition Regulation (DAR) § 2-404.1(b)(vii) (Defense Acquisition Circular No. 76-17, **September 1, (1978)**) authorizes cancellation for a compelling reason, where "all otherwise acceptable bids received are at **unreasonable prices.**" Our Office has stated

that a determination concerning price unreasonableness, which may be based upon comparisons with such factors as Government estimates, past procurement history, current market conditions, or any other relevant factor, is a matter of administrative discretion which we will not question unless the determination is unreasonable or there is a showing of fraud or bad faith. Spruill Realty/Construction Co., B-209148.2, January 31, 1983, 83-1 CPD 102; Omega Container, Inc., B-206858.2, November 26, 1982, 82-2 CPD 475.

We conclude that the difference between the Government estimate and PEI's bid and the expectation of the submission of a significantly lower bid from Westinghouse provide a reasonable basis for the determination to cancel the IFB. We have found cancellation to be justified where the low, responsive bid was as little as 7.2 percent greater than the Government estimate. Building Maintenance Specialists, Inc., B-186441, September 10, 1976, 76-2 CPD 233. While the record does not document the market analysis on which the Government estimate was based, PEI's evidence to show that its bid price was reasonable because it is consistent with the prices PEI is charging other users is not persuasive. The evidence fails either to show the other prices or that the procurements were for a similar item. Furthermore, we have found that an impermissible auction is not created when a contracting activity cancels based on information obtained from a prior supplier which did not bid. See Stewart-Thomas Industries, Inc., B-196295, March 5, 1980, 80-1 CPD 175. Finally, the inability of Westinghouse to bid eliminated one of the obviously limited number of sources for the item. This alone might very well have supported the cancellation. See Chemical Compounding Corporation, B-210317, May 10, 1983, 83-1 CPD 499. In our view, the refusal of PEI to reduce its price, the difference between that price and the Government estimate, and the exclusion of Westinghouse provided a reasonable basis for cancellation.

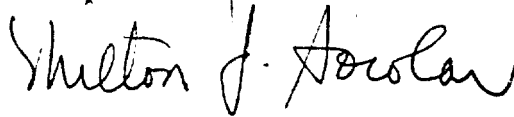
With respect to PEI's allegation of bad faith on the part of the Navy, the record must show "well-nigh irrefragable [irrefutable] proof" that the agency had a malicious and specific intent to injure the party alleging bad faith. Kalvar Corporation, Inc. v. United States, 543 F.2d 1298, 1301 (Ct. Cl. 1976); Allied Sales & Engineering, Inc., B-203913; B-204102, January 8, 1982, 82-1 CPD 23. Nothing

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submitted by PEI satisfies this substantial burden of proof.
See Photo Data, Inc., B-208272, March 22, 1983, 83-1 CPD
281.

Protest denied.

A handwritten signature in cursive script, reading "Shilton J. Arolan".

Acting Comptroller General
of the United States